84-218

No. .....

In The

Supreme Court of the United States

October Term, 1984

PETER G. BURNETT,

Petitioner,

vs.

MUNICIPALITY OF ANCHORAGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

DANIEL WESTERBURG
BIRCH, HORTON, BITNER,
PESTINGER and ANDERSON
1127 West Seventh Avenue
Anchorage, Alaska 99501
(907) 276-1550

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

47 pp

QUESTIONS PRESENTED FOR REVIEW

An Anchorage drunk driving ordinance makes it a criminal offense, punishable by fine and mandatory imprisonment, for a motorist to refuse a breath test. The following questions concerning the constitutionality of the ordinance are presented here for review:

(1) Whether a breathalyzer test is a consentual warrantless search under the Fourth Amendment; and if so, may the state impose mandatory imprisonment upon a motorist who peacefully refuses consent?

(2) Does the imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test violate this right to Equal Protection under the law, guaranteed by the Fourteenth Amendment, by creating a special class of citizens who are not protected by the Fourth Amendment?

(3) Does the imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test impose an unconstitutional condition upon the exercise of his Fourth Amendment rights, contrary to the Equal Protection clause of the Fourteenth Amendment?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

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OPINIONS BELOW

The Opinion of the Alaska Court of Appeals, affirming Peter Burnett's conviction for refusing to take a breathalyzer test, was issued on March 23, 1984 and is officially reported at 678 P.2d 1364 (Alaska App. 1984). A copy of the Opinion is attached as Appendix "A". The

Alaska Court of Appeals' ORDER denying Mr. Burnett's PETITION FOR REHEARING was entered on April 10, 1984. That ORDER was not officially reported and is reproduced at Appendix "B". The Alaska Supreme Court's ORDER denying Mr. Burnett's PETITION FOR HEARING was issued on June 7, 1984. The ORDER has not been officially reported. A copy is attached as Appendix "C".

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JURISDICTIONAL STATEMENT

On August 8, 1983, Peter Burnett entered a *nolo contendre* plea to a charge of refusing to take a breathalyzer test, a violation of Anchorage Municipal Code 9.28.022(c). With the approval of the trial court and the prosecutor, Mr. Burnett reserved his right to appeal his earlier filed and rejected constitutional challenges to the ordinance's validity. (*See Oveson v. Anchorage,* 574 P.2d 801 (Alaska 1978) and *Cooksey v. State,* 524 P.2d 1251 (Alaska 1974), authorizing this procedure.)

Judgment was entered on August 8, 1983. (Appendix "D"). A timely appeal was perfected to the Alaska Court of Appeals which affirmed the convicton on March 23, 1984, in *Burnett v. Municipality of Anchorage,* 678 P.2d 1364 (Alaska App. 1984). (Appendix "A"). Mr. Burnett's Petition For Rehearing was denied on April 10, 1984. (Appendix "B"). A Petition For Hearing was timely filed with the Alaska Supreme Court and was denied without Opinion on June 7, 1984. (Appendix "C").

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Statutes

Alaska Statute 28.35.032: Refusal to Submit to Chemical Test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under A.S. 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresidence privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged

to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by A.S. 28.35.035.

Alaska Statute 28.35.035: Administration of Chemical Tests Without Consent. (a) If a person is under arrest for the crime of driving while intoxicated and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under A.S. 28.35.031 and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood.

Ordinances

Anchorage Municipal Code § 9.28.022 (in relevant part): *Refusal To Submit To Chemical Tests.*

A. Except as provided by A.S. 28.35.035 or AMC 9.28.025, a chemical test shall not be given if a person under arrest refuses the request of a law enforcement officer to submit to the said test, after being advised by the officer that:

1. his or her refusal will, if that person was arrested while he or she was operating, driving, or in ac-

tual physical control of a motor vehicle, result in the suspension, denial or revocation of his or her license or his or her nonresident privilege to drive; and

2. the refusal may be used against him or her in a civil or criminal action or proceeding arising out of an act alleged to have been committed by him or her while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated; and

3. the refusal is a misdemeanor.

B. The refusal of a person to submit to a chemical test of his or her breath under A of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating, driving, or in actual physical control of a motor vehicle or operating an aircraft or watercraft while intoxicated.

C. Refusal to submit to the chemical test of breath authorized by AMC 9.28.021 is a misdemeanor.

D. Upon conviction of a person under subsection C, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours. Upon a subsequent conviction within five years after a conviction under this section or of driving while intoxicated in this or any other state, the court shall impose a minimum sentence of imprisonment of not less than 10 consecutive days unless the subsequent conviction is within one year of the previous conviction, in which case the court shall impose a minimum sentence of

imprisonment of not less than 20 consecutive days. The execution of sentence may not be suspended nor may probation be granted until the minimum imprisonment provided in this section has been served. Imposition of sentence may not be suspended, except upon the condition that the defendant be imprisoned for no less than the minimum period provided in this section. In addition, a person convicted under this section shall undertake, for a term specified by court, that program of alcohol education or rehabilitation which the court after consideration of any information compiled under E of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on that person.

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STATEMENT OF THE CASE

A. Factual Background.

Peter Burnett was arrested for drunk driving in Anchorage, Alaska, on March 12, 1984. After his arrest, Mr. Burnett was taken to an Anchorage police station where he was warned of the Municipality's implied consent law and its sanctions for refusing to submit to a breath test. Mr. Burnett was asked to perform a breathalyzer test, but he peacefully refused. He was charged with drunk driving and refusing to submit to a chemical test.

B. How The Federal Questions Were Raised.

1. Trial.

The constitutional questions presented here were first raised in Mr. Burnett's May 13, 1983, MOTION TO DISMISS, which argued that AMC § 9.28.022(c) was unconstitutional on its face and as applied. His Fourth and Fourteenth Amendment arguments were explained at pages 10 to 13 in his May 13, 1983, MEMORANDUM OF LAW supporting the motion. The trial court denied the motion in an ORDER dated August 4, 1983.

The prosecution dismissed Mr. Burnett's driving while intoxicated count and Mr. Burnett plead *nolo contendre* to refusing to submit to a breath test. Pursuant to a procedure authorized by *Cooksey v. State,* 524 P.2d 1251 (Alaska 1974), Mr. Burnett preserved his challenges to the constitutionality of the ordinance under which he was convicted. He later perfected a timely appeal to the Alaska Court of Appeals.

2. Alaska Court of Appeals.

Mr. Burnett fully presented his Fourth Amendment claim in his October 19, 1983, BRIEF to the Alaska Court of Appeals at pages 2-8. The two Fourteenth Amendment claims were presented at pages 16-20 of the same brief.

The Alaska Court of Appeals rejected Mr. Burnett's Fourth Amendment argument in *Burnett v. Municipality of Anchorage,* 678 P.2d 1364, 1368 (Alaska App. 1984) (Appendix "A") and ignored both of the Fourteenth Amendment claims. Mr. Burnett requested a rehearing to determine these undecided issues, but the request was summarily denied on April 10, 1984. (Appendix "B").

2. Alaska Supreme Court.

Mr. Burnett raised his Fourth and Fourteenth Amendment arguments in a PETITION FOR HEARING to the Alaska Supreme Court on April 25, 1984. His Fourth Amendment argument appeared at page 4 of the PETITION; his Fourteenth Amendment arguments appeared at page 7 (equal protection) and page 9 (unconstitutional condition). The PETITION was summarily denied without Opinion on June 7, 1984. (Appendix "C").

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REASONS FOR GRANTING THE WRIT

A. It Is Unconstitutional To Criminalize The Assertion Of Fourth Amendment Rights.

1. A Breathalyzer Test Is A Warrantless Search Under The Fourth Amendment.

The Fourth Amendment protects persons from unreasonable searches and seizures. The rule is well settled that warrantless searches are *per se* unreasonable, subject only to a few specific and well delineated exceptions. *Mincey v. Arizona,* 437 U.S. 385, 390 (1978).

The Fourth Amendment warrant requirement and its sharply limited exceptions apply with equal force to intrusions of the human body as to buildings and other private places. *Schmerber v. California,* 384 U.S. 737, 770 (1966). Cf. *Ybarra v. Illinois,* 444 U.S. 85 (1979), *reh. den.* 444 U.S. 1049 (1980). Accordingly, the taking of a breath sample from a motorist is a search and seizure protected by the Fourth Amendment. *Schmerber* at 737; *State v. Locke,* 418 A.2d 843, 846-47 (R.I. 1980).

There was no warrant obtained in this case. The only exception to the warrant requirement that might have applied was the "consent" exception recognized in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

2. A Breathalyzer Test Requires Consent And Is Not A Search Incident To Arrest.

The Alaska Court of Appeals characterized a breath test as a search incident to arrest, 678 P.2d at 1360. That characterization is wrong.

In order to successfully measure blood alcohol content, the breathalyzer requires alveolar air exhaled from deep within the lungs. R. Erwin, *Defense of Drunken Driving Cases,* § 10-7 (1984). If the test subject exhales short, shallow, or even "normal" breaths, the breath test is ineffective.

Since one cannot be physically compelled to produce alveolar air, it can be obtained by a police officer only with the actual consent and voluntary cooperation of the motorist.

In contrast to a "consent" search, a "search incident to arrest" depends not on the voluntary cooperation of the suspect, but on the power of the State to search and seize at will whether the accused chooses to cooperate or not. *See, e.g., United States v. Rico,* 594 F.2d 320 (2d Cir. 1979).

Some chemical tests are searches incident to arrest, as was the blood test in *Schmerber v. California,* 384 U.S. 757 (1966). In that case, the search incident to arrest occurred when the defendant's blood was forceably extracted after the defendant had refused to provide a breath sam-

ple. *Id.* at 758, 765, n.9. A *Schmerber*-type search cannot be performed in Alaska, because A.S. 28.35.032 provides that, except under limited circumstances not present here, no chemical test can be administered if the suspect refuses to consent to a breath test. Thus, the Alaska legislature has deliberately foreclosed the power of law enforcement agents to seize from an unwilling motorist physical evidence of his blood alcohol level.

3. "Consent" Gained By Threat Of Imprisonment Is Not Voluntary.

Mr. Burnett's case specifically raises the question whether local government has the right to force a motorist to "consent" to a search of his body through the threat of a mandatory jail sentence. For consent to be valid, it must be voluntary. See *Schneckloth v. Bustamonte,* 412 U.S. 218, 233-34 (1973); *Bumper v. State of North Carolina,* 391 U.S. 543, 548 (1968).

A corrollary to a true consent is the right of the suspect to peacefully refuse to grant it. *Schneckloth* at 227. To make the exercise of that right a criminal offense would inhibit the exercise of Fourth Amendment rights. *Elson v. State,* 659 P.2d 1195 (Alaska 1983). *See also Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

"Consent" obtained by threat of imprisonment and the chilling of Fourth Amendment rights cannot be voluntary.

4. The Ordinance Is A General Warrant Law And Violates The Fourth Amendment On Its Face.

By means of AMC 9.28.022(c), the Anchorage General Assembly has, by legislative fiat, forced Anchorage motorists to consent to warrantless searches and seizures. The ordinance requires that a motorist be imprisoned if he asserts his Fourth Amendment right to peacefully refuse consent to a warrantless search. As such, the ordinance constitutes a "general warrant" law.

General warrants have long been abhorrent to American notions of personal liberty and the existence of such warrants under English law served as the primary impetus for the inclusion of the Fourth Amendment in the Bill of Rights. *See Henry v. United States,* 361 U.S. 98, 100-01 (1959).

AMC 9.28.022(c), as with any general warrant law, violates the Fourth Amendment on its face and should have been stricken by the state courts.

B. The Imposition Of Criminal Penalties For The Peaceful Refusal To Submit To A Breath Test Creates A Special Class Of Citizens Unprotected By The Fourth Amendment.

AMC 9.28.022(c) creates a distinct class of defendants who must pay for their assertions of Fourth Amendment rights with the loss of the fundamental right to liberty. All other Alaskan criminal defendants retain their Fourth Amendment right to peacefully withhold consent to a search without a loss of liberty. *Elson v. State,* 659 P.2d 1195 (Alaska 1983).

The theory underlying the equal protection clause of the Fourteenth Amendment is that all persons similarly situated must be treated alike as to privileges, liabilities and burdens. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison,* 301 U.S. 459, 461-62 (1937).

1. The Right To Liberty And To Peacefully Refuse Consent To A Warrantless Search Are Fundamental.

A citizen's personal liberty is a fundamental and natural right. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943). Likewise, the right to be free from unreasonable searches and seizures under the Fourth Amendment is fundamental. *Gouled v. United States,* 255 U.S. 298, 303-04 (1921). *See also Coolidge v. New Hampshire,* 403 U.S. 443, 454-55 (1971); *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 357 (1931). One of the acknowledged rights under the Fourth Amendment is the right to peacefully refuse consent to a warrantless search. *Schneckloth v. Bustamonte,* 412 U.S. 218, 231-33 (1973).

2. The Anchorage Ordinance Cannot Satisfy The Strict Scrutiny Tests of "Compelling State Interest" and "Least Drastic Alternative."

AMC 9.289.022(c) denies Anchorage motorists of their fundamental rights by either forcing them to forfeit their right to refuse consent to a search or by taking away their liberty if they assert that right.

When an ordinance impinges upon fundamental freedoms, the State must satisfy the "strict scrutiny" test

by demonstrating a compelling state interest and the absence of less drastic alternatives to accomplish its purpose. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 34, *reh. den.* 422 U.S. 959 (1973). Neither prong of the test can be met here.

The purpose of AMC 9.28.022(c) can be learned from *Lundquist v. Dept. of Public Safety,* 674 P.2d 780 (Alaska 1983), where the Alaska Supreme Court explained the purpose of a State statute virtually identical to the ordinance as follows:

> [T]his statute is merely an internal operating procedure that provides a sanction for those persons who refuse to submit to the test. This sanction is nothing more than a non-violent means of compelling submission to a test that provides evidence of intoxication.

Id. at 785.

According to *Lundquist,* the purpose of the statute (and presumably the corresponding ordinance) is to simplify the police officer's task in gathering evidence in drunk driving cases. Such a purpose can always be asserted when government chooses to obtain evidence by means of a legislated general warrant. However, when the purpose of a law is to by-pass protections guaranteed by the Fourth Amendment, certainly that purpose cannot be legitimate or compelling.

Even assuming, *arguendo,* that coercing a waiver of constitutional rights by threat of imprisonment is a legitimate and compelling state interest, legislative enactments impinging fundamental rights must still be narrowly drawn to accomplish only the compelling state interest at

stake. The least drastic means of achieving the governmental purpose must be used and infringement on constitutional rights kept to the barest minimum. *Zablocki v. Redhail,* 434 U.S. 374 (1978); *Roe v. Wade,* 410 U.S. 113 (1973).

Revoking the driver's license or requiring a mandatory blood test of a motorist who refuses a breath test are less drastic means of accomplishing the government's aim of securing evidence than coercing "consent" to a search by threats of imprisonment. *See, e.g., Schmerber v. California,* 384 U.S. 757 (1966).

Other states have tailored their implied consent statutes to avoid unnecessary encroachment on their citizens' fundamental rights of personal liberty and against unreasonable searches and seizures. Those states have enacted constitutional methods of either revoking an uncooperative motorist's driver's license or authorizing forced blood extraction as permitted in *Schmerber. See, e.g., Va. Code* §18.2-265 (Supp. 1983) (license revocation lasting up to six months); *Wisc. Stat. Ann.* § 343.305 (West 1971) (nonconsentual blood extraction).

C. Penalizing The Refusal To Submit To A Breathalyzer Test By Imprisonment Places An Unconstitutional Condition On The Implied Consent Statute.

The doctrine of unconstitutional conditions provides that government may not grant a benefit or privilege upon conditions requiring the recipient to relinquish his constitutional rights. *Simmons v. United States,* 390 U.S. 377 (1968). In Anchorage, under the ordinance chal-

lenged here, a motorist's personal liberty is conditioned upon the waiver of Fourth Amendment rights.

Historically, this Court has correctly refused to permit criminal prosecutions based upon a defendant's failure to waive the right to peacefully withhold consent to a warrantless search. In *Camara v. Municipal Court,* 387 U.S. 523 (1967), the petitioner had been charged with refusing to permit building inspectors to search his house without a warrant. He challenged the constitutionality of the statute which criminalized his conduct. On appeal, this Court held that the petitioner had a constitutional right to insist upon a warrant, and that he could not be constitutionally convicted for refusing to consent to the search. *Id.* at 942. *See also, See v. City of Seattle,* 387 U.S. 541 (1967).

If a criminal prosecution for refusing to waive Fourth Amendment rights is impermissible where the object of the search is a building, the same result should occur when the search is of a person. In either situation, the government has attached an unconstitutional condition to the exercise of Fourth Amendment Rights. As Mr. Justice Stewart stated in *United States v. Jackson,* 390 U.S. 570 (1968):

> If the provision [has] no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

Id. at 581-82. *See also Lefkowitz v. Cunningham,* 431 U.S. 801 (1977).

The Anchorage ordinance challenged here forces Anchorage motorists to waive their Fourth Amendment rights

in order to maintain their personal liberty. To condition one's right to liberty in this manner is, in the words of Justice Stewart, "patently unconstitutional".

CONCLUSION

Condoning the ordinance challenged here will open the door for state and local legislatures to enact similar general warrant laws in other contexts. If refusing consent to a breathalyzer test can be made a criminal offense, so can refusing consent to other types of searches.

For all of the reasons discussed above, Mr. Burnett respectfully requests that his PETITION FOR WRIT OF CERTIORARI be granted.

Dated this 31st day of July, 1984, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER,
PESTINGER AND ANDERSON
Attorneys for Petitioner

By: /s/ DANIEL WESTERBURG
WILLIAM F. DEWEY, Attorney
and PAMELA R. KELLEY,
Legal Intern, on Brief

APPENDIX "A"

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter*. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

File No. A-75

PETER G. BURNETT,

Appellant,

vs.

MUNICIPALITY OF ANCHORAGE,

Appellee.

OPINION

[No. 353 - March 23, 1984]

Appeal from the District Court of the State of Alaska, Third Judicial District, Anchorage, George Peck, Magistrate, and Natalie K. Finn, Judge.

Appearances: William F. Dewey, Birch, Horton, Bittner, Pestinger & Anderson, Anchorage, for Appellant. James F. Wolf, Assistant Municipal Prosecutor, Allen M. Bailey, Municipal Prosecutor, and Jerry Wertzbaugher, Municipal Attorney, Anchorage, for Appellee.

Before: Bryner, Chief Judge, Singleton, Judge, and Hanson, Superior Court Judge.* [Coats, Judge, not participating.]

SINGLETON, Judge.

BRYNER, Chief Judge, concurring.

Peter G. Burnett pled no contest to a charge of refusing a breathalyzer test. AMC 9.28.022(C). With the approval of the court and the prosecutor he reserved the right to appeal the rejection of his constitutional challenges to the ordinance. We therefore have jurisdiction of this appeal. *Oveson v. Anchorage,* 574 P.2d 801, 803 (Alaska 1978); *Cooksey v. State,* 524 P.2d 1251, 1257 (Alaska 1974).

Burnett challenges the ordinance on its face, alleging that it violates the state and federal constitutions. He concedes that we rejected the same arguments in *Svedlund v. Anchorage,* 671 P.2d 378 (Alaska App. 1983). *See also Jensen v. State,* 667 P.2d 188 (Alaska App. 1983); *Coleman v. State,* 658 P.2d 1364 (Alaska App. 1983). He vigorously argues, however, that *Svedlund* was wrongly decided and should be overruled. He bases his primary argument on *Elson v. State,* 659 P.2d 1195 (Alaska 1983), which he contends cannot be reconciled with *Svedlund.* We believe Burnett has misconstrued the holding of *Elson.* We are satisfied that *Svedlund* was properly decided and that it is compatible with the decisions of the Alaska Supreme Court. We therefore affirm his conviction.

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*Hanson, Superior Court Judge, sitting by assignment made pursuant to article IV, Section 16 of the Constitution of Alaska.

THE *ELSON* DECISION

Elson was lawfully arrested by a state trooper for driving while intoxicated. Pursuant to the arrest, the trooper conducted a pat down search and felt something hard in Elson's back pocket which he believed was a knife. When the trooper attempted to remove the object Elson attempted to stop him by grabbing his hand. The object turned out to be a cocaine snifter and a vial containing cocaine residue. Prior to his trial for possession of cocaine, Elson sought a protective order to prevent admission of any testimony by the trooper regarding Elson's attempt to prevent the search of his pocket. The motion was denied and Elson was convicted.

Elson appealed to this court, and we upheld the admission of the trooper's testimony, finding no violation of the right to privacy. *Elson v. State*, 633 P.2d 292, 297-98 (Alaska App. 1981). We recognized prior decisions of the Alaska Supreme Court holding that evidence of a defendant's refusal to consent to an illegal search was not admissible at trial. However, we concluded that the trooper's search of Elson was a legal search incident to arrest and therefore his refusal to consent to the search was admissible in evidence to show consciousness of guilt, *i.e.*, knowledge of possession of contraband.

The supreme court disagreed:

> In our view, the crucial question is not whether a search is illegal, but rather whether the admission of a refusal to consent to a search, legal or illegal, will inhibit the exercise of fourth amendment rights. The contrary position advocated by the state, in which the admissibility of the refusal would turn on the the

> (sic) legality of the search, places an individual facing a police request to search in a difficult dilemma. As Elson points out, the legality of a search is often determined long after the fact, and thus a person who is asked to consent to a search would not know whether he is protecting or prejudicing himself by choosing not to consent. If the person consents, the fruits of the search would be admissible regardless of whether the police had the right to search without consent. If the person believes the search is impermissible and withholds his consent, he risks having his refusal considered as an admission of guilt if it is later ascertained that the nonconsensual search was permissible. An individual in this situation would have to balance a desire to assert his perceived fourth amendment rights against the risk of self-incrimination. This tension is magnified by the fact that in deciding whether to consent to a search, the individual is usually acting without the benefit of counsel's advice as to the legality of the police conduct and the possible success of fourth amendment objections. In our view, the analysis adopted by the Court of Appeals would penalize individuals for their ignorance of the arcane intricacies of search and seizure law by allowing mistaken assertions of perceived fourth amendment rights to be used as evidence of guilt.

Elson v. State, 659 P.2d at 1198-99.

The supreme court therefore held that a verbal refusal to consent to a legal search was privileged and could not be used as evidence of guilt in a subsequent prosecution. *Id.* at 1199. The court then considered whether Elson had a constitutional right to physically resist the search of his back pocket. The court concluded that a private citizen may not use force to resist a peaceful search by one he knows or has good reason to believe is an authorized police officer performing his duties regard-

less of whether the search is ultimately determined to be illegal. *Id.* at 1200. Such conduct was therefore not privileged. Elson's argument that the evidence of his resistance should have been excluded because its probative value was outweighed by the danger of unfair prejudice was also rejected. *See* A.R.E. 403. The court concluded that evidence of Elson's physical resistance did have some tendency to show "that he was aware of the cocaine in his pocket" and consequently was properly admitted. *Id.* at 1201.

In reaching these conclusions the court expressly refused to consider whether a refusal to provide physical characteristic evidence fell within the evidentiary privilege it had established. The court said:

> We recognize that some courts have held that a defendant's refusal to provide "non-testimonial" evidence (fingerprints, writing sample, *breath sample*) is admissible at trial. The general rationale adopted by these cases is that the defendant has no fifth amendment right to refuse to cooperate or to submit to the tests, thus the admission of the defendant's refusal does not infringe on the privilege against compelled self-incrimination. The defendant's refusal to consent is seen not as a testimonial communication but rather as conduct which is circumstantial evidence of his consciousness of guilt. Whatever the merits of this line of reasoning, we think it is inapplicable to cases where the defendant refuses to consent to a search which he mistakenly believes to be illegal. It is settled that a defendant has no federal constitutional right to refuse to provide evidence of his physical traits. The admission of the defendant's refusal in one case will not inhibit his future assertion of his fifth amendment rights since by definition the defendant will never have the right to refuse to provide this

> evidence. In contrast, the admission of an individual's refusal to consent to a legal search in one case may inhibit individuals from exercising the right to refuse consent to some future illegal search. We therefore hold that evidence of a refusal to consent to a search is inadmissible regardless of the legality of the search.

659 P.2d at 1199 (footnotes omitted; citation omitted) (emphasis supplied).

We addressed *Elson* in *Svedlund,* where we said:

> Svedlund argues that there is a constitutional right to refuse to consent to a search. He reasons that a breathalyzer examination is a search and consequently concludes that sanctioning his refusal constitutes an impairment of his right to be free of unreasonable searches. *See Elson v. State,* 659 P.2d 1195, 1199 (Alaska 1983).
>
> Assuming *arguendo* that the breathalyzer could be construed as a "search," the police may lawfully search incident to an arrest. A suspect cannot be prosecuted for refusal to submit to a breathalyzer unless there is probable cause to believe he was driving while intoxicated. We conclude that offering Svedlund a breathalyzer examination, where there was independent evidence establishing probable cause to charge him with driving while intoxicated, was a lawful search incident to an arrest. Prosecuting Svedlund for refusing the test did not violate his fourth amendment rights.

671 P.2d at 384 (footnote omitted; citations omitted).

During oral argument Burnett questioned our hesitancy in *Svedlund* to label a breathalyzer examination a "search" and criticized our conclusion that characterizing such an examination as a search incident to an arrest solves all of the problems presented by the *Elson* case. He suggests that our uncertainty about the "search" issue has generated substantial confusion in the trial courts.

IS A BREATHALYZER EXAMINATION A SEARCH?

The state and federal constitutions protect the right of the people to be secure in their persons, houses, and other property, papers and effects against unreasonable searches and seizures. *See* Alaska Const. art. I, § 14; U.S. Const. amend. IV. Neither constitution defines the term "search." In *Weltz v. State,* 431 P.2d 502 (Alaska 1967), the supreme court stated:

> A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a 'search'.

431 P.2d at 505 (footnote omitted) (quoting *Brown v. State,* 372 P.2d 785, 790 (Alaska 1962).

In a subsequent case, *Schraff v. State,* 544 P.2d 834, 839 (Alaska 1975), the supreme court observed: "Certainly riffling through a person's wallet for contents which are unobservable from outside the wallet fits this definition of a search." These descriptions reflect the traditional view of a search as a trespass to person or property.

In *Katz v. United States,* 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576, 583 (1967), the United States Supreme Court defined "search" as an invasion of personal privacy rather than as a common law trespass. In his concurring opinion Justice Harlan suggested a two-pronged test to identify those cases where an invasion of privacy constitutes a constitutional search:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement,

> first that a person have exhibited an actual (subjuctive) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed2d at 587-88 (Harlan, J., concurring).

The Alaska Supreme Court has applied Harlan's two-pronged test in a number of cases. *See, e.g., State v. Daniel,* 589 P.2d 408 (Alaska 1979). The *Katz* test encompasses conduct that would not satisfy the earlier definition of a common law trespass. In *Dye v. State,* 650 P.2d 418, 421-22 (Alaska App. 1982), we recognized that the converse might be true; some conduct that would have been a search under the *Weltz* definition because it would constitute a technical trespass would not qualify under the *Katz* test because society was not prepared to recognize the owner's expectation of privacy as reasonable. In *Dye* a fish biologist who was authorized to be on a ship's deck to observe the unloading of crab went into the ship's hold without permission and clearly committed a trespass. We nevertheless found that his trespass did not constitute a search. We found:

> [T]he question presented is whether under the relevant facts and circumstances Dunaway's observations constituted a search. Phrased differently, did the captain and crew of the vessel Yankee Clipper (1) have a subjective expectation of privacy in the crab stored in the ship's hold at the time of Dunaway's observations; and (2) was that expectation, if held, one which society would protect?

650 P.2d at 421-22. We deferred to the trial court's determination that the defendants had an actual expectation of privacy in the cargo but concluded that it was not one

that society was prepared to respect. We reached this conclusion in part because the only evidence observed by the biologist—undersized crab—was in the process of being moved onto the deck where it would have been in plain view. Our conclusion parallelled the doctrine of inevitable discovery. We therefore denied Dye's constitutional claim.

We applied the same reasoning in *Liston v. State,* 658 P.2d 1346, 1348 n.1 (Alaska App. 1983), where we decided that requesting an incarcerated defendant to provide nontestimonial evidence, *i.e.,* thumb prints, was not a constitutional search. We recognized that obtaining identification evidence might, unless privileged, constitute a trespass, but held that standing alone it would not constitute a "search". We distinguished between two types of requests for evidence of personal characteristics based on whether granting the request would subject a suspect to pain or embarrassment. If a request for nontestimonial evidence does not have such an effect then it is not a search. Where, however, obtaining the evidence would subject the person to pain or embarrassment, we would find a "search" and require either consent or a court order. *Id. See also Cupp v. Murphy,* 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973). We note that in *Illinois v. Andreas,* — U.S. —, 103 S.Ct. 3319, — L.Ed2d — (1983), a majority of the United States Supreme Court implicitly recognized that police conduct could constitute a common law trespass to property and nevertheless not constitute a "search" under the constitution. The Court held that the loss of the defendant's privacy interest in the contents of a sealed container as a result of a prior lawful search precluded a finding of an unconstitutional search where officers indisputably trespassed against the defendant's property rights in the container by conducting a second search.

Given the numerous recent decisions of the United States Supreme Court indicating that a defendant has no constitutional right to refuse to supply physical characteristic evidence, including a breath sample, we recognize that arguably a demand for such evidence may not constitute a search under the *Katz* test. *See, e.g., South Dakota v. Neville,* — U.S. —, —, 103 S.Ct. 916, 923, 74 L.Ed.2d 748, 759 (1983) (refusal to take a breathalyzer examination not protected by the privilege against self-incrimination); *United States v. Mara,* 410 U.S. 19, 22, 93 S.Ct. 774, 776, 35 L.Ed2d 99, 103 (1973) (demand for handwriting exemplars violated no fourth amendment interest); *United States v. Dionisio,* 410 U.S. 1, 14-15, 93 S.Ct. 764, 771-72, 35 L.Ed2d 67, 79-80 (1973) (demand for voice exemplar not a fourth amendment search). *But see Cupp v. Murphy,* 412 U.S. at 295, 93 S.Ct. at 2003, 36 L.Ed2d at 905 (fingernail scrapings constituted the type of "severe, though brief, intrusion" upon defendant's personal security that is subject to constitutional scrutiny); *Commonwealth v. Quarles,* 324 A.2d 452, 460 (Pa. Super. 1974) (breathalyzer examination is a search).

We believe that the question of whether a breathalyzer is a search is a close issue. *See Illinois v. Andreas,* — U.S. at —, —, —L.Ed2d at —, —, 103 S.Ct. at 3325, 3329 (Marshall, J., dissenting; Stevens, J., dissenting). It was not necessary for us to decide the issue in *Svedlund* because both the Anchorage ordinance discussed in *Svedlund* and the state statute discussed in *Jensen* required probable cause to arrest a person for driving while intoxicated before requiring him to take a breathalyzer. We conclude, therefore, that we should assume *arguendo* that a breathalyzer examination is a search. Where such an

examination is conducted in compliance with AMC 9.28.022 or AS 28.35.031-.032, we are satisfied that it is a reasonable search under the constitution because it is incident to arrest. *See Cupp v. Murphy*, 412 U.S. at 295, 93 S.Ct. at 2003, 36 L.Ed.2d at 905. *See also* 1 W. LaFave, *Search and Seizure* § 2.6(a) (1978).[1]

Burnett argues that even if a demand that he submit to a breathalyzer would be a search incident to an arrest and therefore exempt from fourth amendment protection, his refusal cannot be sanctioned without violating the rule of *Elson*. We disagree. We are satisfied that *Elson* did not hold that comment on the exercise of a constitutional right was itself a constitutional violation. Rather we read the supreme court as establishing a limited evidentiary privilege similar to A.R.E. 407 (precluding evidence of subsequent remedial measures to show negligence) and

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1. A person's breath, like the sounds he utters, originates inside him but is constantly exposed to the public. In this sense a breathalyzer examination has much in common with the recording of voice exemplars discussed in United States v. Dionisio, 410 U.S. at 15, 93 S.Ct. at 771, 35 L.Ed.2d at 79. It would not seem that blowing into a breathalyzer would be a greater intrusion on privacy than speaking into a recorder. The ultimate question is one of value. Should a free society tolerate subjection of citizens to breathalyzer examinations free of constitutional constraints? In a different context, LaFave suggests some good reasons for characterizing intrusions similar in nature to breathalyzer examinations as searches, for example, canine sniffs, magnetometers and x-rays. *See* 1 W. LaFave, Search and Seizure § 2.2(f) (1978). On the other hand, in United States v. Place, — U.S. —, —, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110, 121 (1983), the Court held that subjecting luggage to sniffing by trained dogs did not constitute a search. The court felt that a canine sniff was *sui generis* regarding the manner of obtaining information and the limited content of the information obtained. This rationale might also apply to breathalyzer examinations since they are limited both in terms of the nature of the intrusion and the nature of the information produced.

A.R.E. 408 (prohibiting introduction of evidence of compromise or offers to compromise). This is clear from the supreme court's refusal to extend the privilege to physical resistance. *Elson v. State,* 659 P.2d at 1200. We note that Justice Compton, who dissented on this issue and would have found nonviolent physical resistance privileged, nevertheless conceded that the conduct to which he would have extended the privilege could result in criminal penalties for resisting or interfering with an arrest. 659 P.2d at 1206 (Compton, J., dissenting). Nothing in *Elson* purports to preclude a statute making suppression of evidence a crime even though the conduct constituting the suppression of evidence might be characterized as resistance to a search. Such conduct is generally subject to sanction. *See* 1 W. LaFave, *Search and Seizure* § 1.11 (1978).

We see no reason to establish a privilege in this case. First, we do not believe that an evidentiary privilege that is not mandated by the constitution can invalidate a properly enacted statute. Second, the Alaska Supreme Court in *Elson* established an evidentiary privilege barring the adverse use in evidence of a refusal to consent to a search based on a reasoning process similar to that contemplated by Alaska Evidence Rule 403. In *Elson* the supreme court recognized the prejudicial effect of admitting evidence of refusal to consent to a search to show consciousness of guilt; it could result in chilling the future exercise of fourth amendment constitutional rights. Essentially, the supreme court found that this undesirable result outweighed the probative value of the evidence as a matter of law, justifying establishment of a privilege barring its admission. In contrast, the court reasoned that where the

refusal was physical, the public policy in favor of discouraging resisting arrest outweighed the risk of chilling constitutional rights so that the probative value of the evidence, while still weak, outweighed its prejudicial effect. *Id.* at 1201.

When we apply this reasoning to refusal to take a breathalyzer it is clear that no privilege should be established. The legislature did not choose to punish refusal to take a breathalyzer because it believed that such a refusal established consciousness of guilt of drunk driving. Rather, the legislature sought to punish suppression of evidence which might be either inculpatory or exculpatory. *See Jensen v. State,* 667 P.2d 188, 190 (Alaska App. 1983). *See also Lundquist v. State,* — P.2d —, —, Op. No. 2763 at 7-8, 13-14 (Alaska, December 9, 1983). Thus the probative value of evidence of a refusal is high because it is virtually conclusive on the primary element of the offense. *Cf. Johnson v. State,* 662 P.2d 981, 989 (Alaska App. 1983) (trial court did not err in permitting defendant's admission that he had intercourse with complaining witness into evidence despite contention that admission constituted refusal to submit to pubic hair combing based upon alleged fourth amendment rights).

We also conclude that the "prejudicial effect" of the statute on the exercise of fourth amendment rights is virtually nonexistent. A defendant is entitled to certain warnings clarifying that he has no constitutional right to refuse the test. Thus there is little risk that he reasonably could be confused about his rights. Further, we see no reason to establish a privilege in this case because the defendant does not lose the right to contest probable cause

to arrest by submitting to the breathalyzer. If the defendant was illegally stopped or arrested then his consent to the breathalyzer examination would be tainted by that illegal arrest. *See Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (fingerprints obtained as result of illegal arrest suppressed); *Copelin v. State,* 659 P.2d 1206 (Alaska 1983) (defendant's consent to breathalyzer examination does not preclude suppression motion based upon contention that defendant was denied his statutory right to contact counsel prior to deciding to take breathalyzer).

Finally, the statute in question does not violate the rule of *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979). In *Brown,* the Supreme Court invalidated the conviction of a defendant under a statute punishing refusal to provide identification to an arresting officer. The Court did not invalidate the statute on its face, but held that the officer who asked Brown for identification lacked the reasonable suspicion necessary for an investigatory stop; therefore an application of the statute to convict Brown was forbidden by the fourth amendment. In reaching its conclusions, the Court said:

> We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements.

443 U.S. at 53 n.3, 99 S.Ct. at 2641 n.3, 61 L.Ed.2d at 363 n.3 (citations omitted).

The Court's hesitancy was apparently based on a belief that there might be fifth amendment, rather than fourth amendment, problems in sanctioning refusal to provide identification. *See Michigan v. DeFillippo,* 443 U.S.

31, 44, 99 S.Ct. 2627, 2636, 61 L.Ed.2d 343, 354 (1979) (Brennan, J., dissenting) 3 W. LaFave, *Search and Seizure* § 9.4(g) (Supp. 1984). As we have seen, however, the fifth amendment does not preclude sanctioning a refusal to submit to a breathalyzer examination. *Coleman v. State,* 658 P.2d 1364 (Alaska App. 1983).

We conclude that a statute or ordinance penalizing refusal to submit to a breathalyzer test does not violate the fourth or fourteenth amendments of the United States Constitution, or article 1 of the Alaska Constitution.

The judgment of the district court is AFFIRMED.

BRYNER, Chief Judge, concurring.

I concur in the result reached by the majority of the court. I also agree with the court's conclusion that the taking of a breath sample should be treated as a fourth amendment search. However, I am not convinced that the narrow reading given by the court to *Elson v. State,* 659 P.2d 1195 (Alaska 1983), is appropriate. I am not certain that the court's interpretation of *Elson* accurately reflects the intent of the supreme court in that case. Nor do I believe that a narrow reading of *Elson* is necessary to a correct disposition of Burnett's claim on appeal. I think that a proper reconciliation of our holding in *Svedlund v. Anchorage,* 671 P.2d 378 (Alaska App. 1983), with the supreme court's holding in *Elson* depends more upon the validity of the implied consent doctrine than it does upon a restrictive reading of *Elson.*

In *Elson,* the supreme court's primary concern was with the typical situation encountered in search and seizure cases, where an individual's consent will independently

validate a warrantless search. It was in this context that the supreme court emphasized the dilemma created by a rule permitting comment on an individual's refusal to consent to a lawful search:

> [T]he legality of a search is often determined long after the fact, and thus a person who is asked to consent to a search would not know whether he is protecting or prejudicing himself by choosing not to consent. If the person consents, the fruits of the search would be admissible regardless of whether the police had a right to search without consent.

Elson, 659 P.2d at 1198-99 (footnote omitted). By precluding comment on the exercise of the right to withhold consent to a search, the court in *Elson* sought to assure that individuals could preserve their right to challenge the validity of warrantless searches, without fear of suffering prejudice.

By contrast, when an individual is asked to submit to a breathalyzer examination, a different situation arises; consent to take a breathalyzer cannot realistically be equated with other cases in which consent to a warrantless search is given. The obligation to submit to a breathalyzer examination arises only after an arrest, based on probable cause, for driving while intoxicated. In such cases, police officers must inform arrestees that they are required by law to submit to a breathalyzer examination. Because the implied consent warning states that submission to a breathalyzer test is required by law, a person who "consents" to take the test does not forfeit the right to challenge the admissibility of his test results; where probable cause for arrest does not exist, suppression of the test results will be required. Conversely, in the event of a refusal, lack of probable

cause for arrest would be a complete defense to a criminal charge for refusing to submit to the test.

These differences between implied consent cases and other types of cases involving consent to warrantless searches reflect the need to consider carefully the function performed by the implied consent law.

The purpose of implied consent is not, as Burnett contends, to compel a waiver of fourth amendment rights or to penalize the refusal to give such a waiver. Because the implied consent statute requires a lawful arrest for driving while intoxicated before a person can be requested to submit a sample of his breath, the warrantless seizure of a person's breath will be justified as a search incident to arrest in every case where police properly request a breathalyzer test. Where a police request for a breath sample is improper because probable cause to arrest does not exist, consent to take the test would not constitute a waiver of fourth amendment rights, since evidence of the test results would be subject to subsequent challenge and suppression. Thus, the implied consent statute simply does not compel individuals to waive their fourth amendment rights. Rather, the statute requires persons who have been arrested for driving while intoxicated to cooperate in providing police with information that they are legally entitled to obtain. In each case, the authority to obtain the information sought derives not from the implied consent law, but from the probable cause that justified the arrest for driving while intoxicated.

Even if the *Elson* court intended to hold that comment on the exercise of fourth amendment rights was constitutionally prohibited, that holding would be in-

apposite here, because a refusal to submit to a breathalyzer test is not an exercise of fourth amendment rights. Nor do I think that imposition of penalties for a refusal to submit to a breathalyzer tends to chill the legitimate exercise of fourth amendment rights. As previously indicated, persons arrested for driving while intoxicated must be given express notice that they are required to submit to a breathalyzer test. If a person does not believe that a warrantless seizure of his breath is justified, he does not forfeit the right to assert this claim by submitting to a breathalyzer test. And if a person correctly believes that probable cause for his arrest was lacking, he cannot be subjected to penalties for his refusal to take the breathalyzer test.

Accordingly, I do not think that the pivotal issue in this case is whether the exercise of fourth amendment rights may properly be penalized. Instead, the issue is whether criminal sanctions may constitutionally be imposed for violation of a law that requires citizens to cooperate with law enforcement officers who seek evidence that they have a right to obtain. The validity of criminal sanctions under these circumstances, I believe, depends largely upon the validity of the substantive provisions of the implied consent law. Because of the high level of public interest in assuring traffic safety, our implied consent statute has withstood constitutional challenge, as have similar statutes in numerous other jurisdictions. If the implied consent law is to be taken seriously then I see no more reason to prohibit imposition of criminal penalties for violation of that law than for violation of any other valid law.

APPENDIX "B"

IN THE COURT OF APPEALS
OF THE STATE OF ALASKA

Court of Appeals No. A-75

PETER G. BURNETT,

Appellant,

vs.

MUNICIPALITY OF ANCHORAGE,

Appellee.

Trial Court No. 3ANM 83-1529 Cr.

O R D E R

Filed and Entered

April 10, 1984

Before: Bryner, Chief Judge, Singleton, Judge and Hanson, Superior Court Judge. [Coats, Judge, not participating.]

On consideration of the petition for rehearing filed April 2, 1984,

IT IS ORDERED:

The petition for rehearing is denied. Contrary to appellant's assertions, all of his constitutional arguments, to the extent argued in his briefs and orally before the court, rely on premises that were unequivocally rejected in the present case or in prior cases before the Court of Appeals. *See Coleman v. State,* 658 P.2d 1364 (Alaska App. 1983), *Jensen v. State,* 667 P.2d 188 (Alaska App. 1983), and *Svedlund v. Anchorage,* 671 P.2d 378 (Alaska App. 1983).

Entered by direction of the court at Anchorage, Alaska on April 10, 1984.

CLERK OF THE COURT OF APPEALS
/s/ DAVID A. LAMPEN

ccs: Counsel

Appeals Deputy, Anchorage Trial Courts

APPENDIX "C"

IN THE SUPREME COURT
OF THE STATE OF ALASKA

Supreme Court No. S-439

PETER G. BURNETT,

Petitioner,

vs.

MUNICIPALITY OF ANCHORAGE,

Respondent.

District Court No. 3ANM 83-1529 Cr.
Court of Appeals No. A-75

ORDER

(Filed June 13, 1984)

Before: Burke, Chief Justice, Rabinowitz, Matthews, Compton and Moore, Justices.

On consideration of the petition for hearing filed on April 25, 1984 and the opposition to the petition filed on May 10, 1984,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on June 7, 1984.

CLERK OF THE SUPREME COURT
/s/ DAVID A. LAMPEN

ccs: Justices
Counsel
Court of Appeals Judges
The Honorable George Peck, Magistrate
The Honorable Natalie K. Finn
Appeals Deputy, Anchorage Trial Courts

APPENDIX "D"

IN THE DISTRICT COURT
FOR THE STATE OF ALASKA

(Filed in the Trial Courts
State of Alaska, Third District
August 8, 1983)

AT ANCHORAGE
( ) STATE OF ALASKA
(xx) MUNICIPALITY OF ANCHORAGE

vs.

PETER G. BURNETT

TYPED
JUDGMENT (COUNT II)

CASE NO. 3, ANM83-1529 CR

DOB: 06-08-60 Date of Offense: 03-12-83 Statute or Ord. 09.28.022 (C)

Crime Charged: REFUSAL TO SUBMIT TO CHEMICAL TEST

Driver's License No. (for traffic cases only) 0371822 ALASKA

PLEA: ( ) Not Guilty ( ) Guilty (xx) No Contest (COOKSIE PLEA) TRIAL: ( ) Court ( ) Jury

The defendant was found and adjudged:

( ) NOT GUILTY. IT IS ORDERED that the defendant is acquitted and discharged.

(xxx) GUILTY of the crime named above.

( ) GUILTY OF

Any appearance bond in this case in exonerated.

STAYED PENDING APPEAL SENTENCE

( ) Imposition of sentence is suspended and defendant is placed on probation until ....., 19.....

(xx) Sentence is imposed as follows:

(xx) Defendant is fined $600 with $300 suspended. The unsuspended $300 is to be paid.

(xx) Defendant is committed to the custody of the Commissioner of Health and Social Services to serve 30 days with all but 72 hours suspended. The unsuspended 72 (hours) are to be served.

( ) Defendant is ordered.

(xxx) Defendant is placed on probation until AUGUST 8, 1984.

( ) Defendant's ( ) driver's ( ) ..... license or privilege to apply therefor is

( ) revoked ( ) suspended ( ) limited for ..... (days) (years) and any such license is to be immediately surrendered to the court.

License Number: .....

A limited license is issued with the following limitations:

(xx) The conditions of defendant's probation are:

NO CRIMINAL VIOLATIONS FOR ONE YEAR.

SEAL

/s/Le Ellen Baker,
ACTING MAGISTRATE

GEORGE PECK
Type or print Judge's name

08-08-83
EFFECTIVE DATE
I certify that on 08-19-83
copies of this form were sent to:
DEWEY
Clerk.